WILAYAH LEASING SDN. BHD.

v.

NG KOK KEONG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 6958 OF 1985]
3 DECEMBER 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of defence - Lease - Equipment possessed - Whether claim can only be made on residual value - Nine months' delay in filing application - Whether application should be dismissed.*

This was an application by the 2nd defendant to set aside a judgment in default of defence entered against him on 3 March 1986. The plaintiff's claim against the 1st and 2nd defendants was for the sum of RM43,755.13 being the agreed loan value as well as loss value pursuant to the lease agreement entered into by the plaintiff and one Seremban Cane Trading, whereby Seremban Cane agreed, *inter alia* to lease from the plaintiff a 3 dimensional pleat pressing machine. In consideration of the plaintiff purchasing the said equipment for the purpose of letting the same to Seremban Cane, the 1st and 2nd defendants became guarantors for the said company.

The 2nd defendant's solicitor submitted that the judgment in default of defence was in excess of the amount due to the plaintiff as the said equipment had already been possessed by the plaintiff at the time judgment was obtained. He contended that the plaintiff was entitled to claim only the residual value.

The plaintiff submitted that there was a nine months' delay in filing the application and requested that the application be dismissed on the ground of delay in filing the same.

Held:

[1] In an application of this nature the Court had to first determine whether the judgment was a regular judgment. But since the parties disputed the judgment sum of RM43,755.13 and as there is no evidence of termination of the said agreement, it cannot be concluded that the plaintiff is entitled to claim the agreed loss value. This matter should in fact go to trial to determine what is the proper amount due.

[2] As regards the delay, in view of the fact that the plaintiff may make a claim far in excess of the amount due to the plaintiff, it would be an injustice to dismiss the application on the ground of delay in filing the application.

[Judgment in default of defence set aside. 2nd defendant to file his statement of defence within 2 weeks. 2nd defendant to pay costs of the application.]

For the plaintiff - J. Chong; M/s. Soo Thien Ming & Sharizat
For the 2nd defendant/applicant - K.N. Singh Bath; M/s. K.N. Singh Bath

JUDGMENT

Zakaria Yatim J:

This is an application by the second defendant to set aside judgment in default of defence entered against him on 3 March 1986.

The plaintiff's claim against the first and second defendants is for a sum of RM43,755.13 being the agreed loan value pursuant to Article 17 of an equipment lease agreement (the said Agreement) entered into between the plaintiff and Seremban Cane Trading on 11 November 1982. Under the terms of the said agreement, Seremban Cane Trading agreed, *inter alia*, to lease from the plaintiff one unit sam hsing 3-dimensional pleat pressing machine modal: SH-603K, serial number: 1215 (the said Equipment) for a term of twenty-five months on the terms and conditions as stated in the said agreement. In consideration of the plaintiff purchasing the said equipment for the purpose of letting the same to Seremban Cane Trading, the first and second defendants became guarantors for Seremban Cane Trading by furnishing to the plaintiff a letter of guarantee and Indemnity dated 11 November 1982. The monthly rental for the said equipment was RM1,411.70 for a period of twenty months. The agreed loss value in accordance with Article 17 of the said agreement was RM43,755.13. The plaintiff alleged that Seremban Cane Trading had, in breach of the said agreement, defaulted in the payment of the monthly rentals from January 1983. By a letter dated 5 September 1983, the plaintiff's solicitors informed Seremban Cane Trading that the plaintiff was terminating the said agreement by virtue of Article 17 of the said agreement and requested Seremban Cane Trading for payment for payment for the full amount of the agreed loss value of RM43,755.13. According to the plaintiff the first and second defendants had failed to pay the arrears of rental and further failed to surrender the said equipment to the plaintiff.

Mr. K.N. Singh, Counsel for the second defendant submitted that the judgment obtained in default of defence was in excess of the amount due to the plaintiff. He told the Court that the said equipment had already been possessed by the plaintiff at the time judgment was obtained. He contended that since the said equipment had been repossessed, the plaintiff was entitled to claim only the residual value. To substantiate his argument, Mr. K.N. Singh referred to para. 14 of the affidavit of the second defendant affirmed on 7 November 1986 in support of the application. Paragraph 14 states:

> According to the guarantee and indemnity letter under item (12) supplementary provision 12(1) the residual value of the equipment Leased shall be RM10,000 only and as such my liability and the first defendant's liability after repossession will be only RM10,000. Wherefore I contend that the plaintiff is not entitled to a claim of RM43,755.13 as the leased equipment had been already repossessed.

Mr. Paul Ong, Counsel for the plaintiff relied on Article 17 of the said agreement. Article 17(1) states:

> (1) If the lessee fails to pay the rent provided for in Article 3 hereof after the same becomes due and payable or any other sums and monies due and payable under this lease agreement or if the lessee fails to observe or perform all and any provision of this lease agreement or if the lessor shall on any reasonable ground consider itself insecure the lessor shall without prejudice to any pre-existing liability of the lessee to the lessor have the right forthwith to exercise all or any of the following remedies without having to give any prior notice or demand to the lessee:

(a) to declare a part of or the entire amount of the total amount of the rent for the whole period of the initial term payable under this lease agreement and all other moneys, sums costs and expenses under this lease agreement immediately due and payable by the lessee;

(b) to take possession of the equipment or demand its return;

(c) to terminate the lease hereby created and to demand from the lessee the full amount of the agreed loss value and in addition thereto to claim from the lessee for compensation for all loss and damages including but not limited to loss of profits.

It was not disputed that the said equipment was repossesssed by the plaintiff. With regard to the termination of the said agreement, it was averred in the statement of claim that the plaintiff's solicitors had written the letter of termination on 5 September 1983 to Seremban Cane Trading. The letter, however was not exhibited to any of the affidavits. The second defendant in his proposed statement of defence claimed no knowledge of such letter. Since no evidence was produced that the plaintiff had terminated the said agreement pursuant to Article 17, it is doubtful whether the plaintiff is entitled to claim the agreed loss value, which is RM43,755.13 or whether the plaintiff is entitled to claim only the residual value.

In an application of this nature the Court has to first determine whether the judgment dated 3 March 1986 was a regular judgment. But since the parties disputed the judgment sum of RM43,755.13 and since there is no evidence of the termination of the said agreement it cannot be concluded that plaintiff is entitled to claim the Agreed Loss Value. This matter should in fact go to trial to determine what is the proper amount due by the second defendant to the plaintiff that is to say whether the second defendant has to pay the residual value as alleged by him or the agreed loss value.

Mr Paul Ong submitted that there was a nine months' delay in filing the present application. I do realise that there was a considerable delay in this case and the defendant has not given any explanation for the delay. However, in view of the fact that the plaintiff may make a claim far in excess of the amount due to the plaintiff, it would be injustice to dismiss the application on the ground of delay in filing the application.

I accordingly set aside the judgment in default of defence. The second defendant will file his statement of defence within two weeks from today. Finally, the second defendant will pay the costs of this application in any event.

Also found at [1987] 2 CLJ 274